

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COUNCIL OF THE CITY OF ST. PAUL

In the Matter of the Auto Repair Garage
License and Second Hand Dealer-Motor
Vehicle License held by Heartland Auto
Sales, Inc., d/b/a Heartland Auto Sales
License No. 19990001008

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for hearing on July 19, 2005, before Administrative Law Judge Steve M. Mihalchick, in Room 41 of the Saint Paul City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 554102. The record closed at the conclusion of the hearing on July 19, 2005.

Rachel Gunderson, Assistant City Attorney, Office of the City Attorney, 400 City Hall, 15 West Kellogg Blvd., Saint Paul, Minnesota 55102, represented the City of Saint Paul's Office of License, Inspections and Environmental Protection (LIEP). Gary Van Cleve, Larkin Hoffman Daly & Lindgren, Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Minneapolis, Minnesota 55431-1194, appeared on behalf of the Licensee, Heartland Auto Sales, Inc.

NOTICE

This Report contains a recommendation and not a final decision. The Saint Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the Saint Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact the Saint Paul City Council, 310 City Hall, Saint Paul, Minnesota 55102, to ascertain the procedure for presenting argument to the Council.

STATEMENT OF ISSUES

This case presents the following issues:

1. Did the Licensee operate Heartland Auto Sales, Inc. in such a manner that it violated the conditions placed upon the license with respect to the number of vehicles parked on the business premises?
2. If so, what sanction should the Saint Paul City Council impose on the Licensee's second hand dealer license?

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Heartland Auto Sales, Inc., d/b/a Heartland Auto Sales (Heartland), operates a used car sales business with an auto repair garage at 1236 Arcade Street in Saint Paul. On April 12, 1999, the Saint Paul City Council issued Heartland a second hand sales license and an auto repair garage license (collectively "Heartland's license") from the City of Saint Paul (license no. 9910001008).^[1] Heartland's license is set to expire on April 14, 2006.^[2]

2. Heartland's license is subject to conditions of operation. The premises at 1236 Arcade contained a laundromat prior to Heartland establishing a used car lot. The City zoning department conducted a site plan review that established standards of use for the property when Heartland established a used car dealership there. The size of the lot is a significant factor in establishing limits for allowable vehicles on the premises.

3. As originally issued, Heartland's license limited parking on the premises to 27 automobiles at one time. In March 2000, Heartland was sanctioned for having too many automobiles on its premises. Heartland agreed to a 120-day monitoring period for compliance.^[3]

4. In January 2002, a notice of sanction was initiated by LIEP for Heartland having 33 vehicles on its premises. The notice of sanction was cancelled after Heartland applied for a modification to the conditional use permit (CUP) governing the use of Heartland's premises.^[4]

5. In 2002, Heartland applied for a change to the CUP governing the premises. The change was approved when the City failed to act on the application within the statutory period.^[5] As modified, the CUP requires, in pertinent part:

2. Subject to normal city review and approval, ... striping of parking spaces on the lot for up to 37 total vehicles to be parked on the lot, including up to 31 parking spaces for vehicles for sale and at least 6 parking spaces reserved for employees and customers, of which at

least 3 shall be designated as customer parking and 1 as handicapped parking.

3. Except for up to 3 employee parking spaces, parking spaces shall be designed to avoid use of the alley as maneuvering lane

5. Retail auto repair is prohibited. The indoor repair bays may only be used for minor repairs in preparation of vehicles for sale.

6. Vehicles intended for sale shall not be parked on any street or project into a public right of way.^[6]

6. Heartland's premises are surrounded by a fence, which prevents any vehicle parked in the lot from projecting out into the public right-of-way. The business also maintains planters and a bench adjacent to the sidewalk. The exterior of the business is well maintained by any standard, and compares quite favorably to other used automobile lots in the area.^[7]

7. On Sept. 12, 2003, LIEP issued a second notice of sanction against Heartland for violating the parking restriction. The matter was settled between LIEP and Heartland. On February 4, 2004, as part of the settlement, the City Council imposed a fine of \$1,000 and a license suspension (for the auto repair garage) of 10 days on Heartland. The suspension and \$500 of the fine were stayed, conditioned on Heartland having no further violations of the parking restriction for 12 months.^[8]

8. LIEP has a policy regarding initiating inspections. Inspections are initiated when complaints about a licensee are received. LIEP received complaints about the number of vehicles present and work being done on vehicles in the parking area of Heartland's premises. Complaints were also received about vehicles parking on the streets near Heartland's premises.^[9]

9. On May 25, 2004, Senior Inspector Kristina Schweinler was out on an inspection visit to a nearby used auto dealership based on a complaint regarding the number of cars parked at that location. While on the way to that business, Schweinler observed Heartland's premises and she believed that the number of cars present exceeded the allowed limit for Heartland. She counted 41 automobiles in the parking lot at that time. On June 10, 2004, Schweinler counted 43 automobiles in the Heartland parking lot.^[10]

10. On January 24, 2005, Schweinler observed Heartland's premises and counted 43 automobiles in the parking lot. On January 31, 2005, Schweinler observed 43 cars on Heartland's premises.^[11] On February 3, 2005, she counted 42 cars in the lot. On February 10, 2005 Schweinler counted 38 cars on the lot, with one automobile being worked on in the front parking lot. The mechanics were using power tools and a radio that could be heard at some distance off of Heartland's premises.^[12]

11. On March 8, 2005, Schweinler received a complaint regarding a business, located near Heartland, on Arcade Street. On the way to investigating that complaint,

Schweinler observed 38 cars in Heartland's lot, with one car being worked on in the back lot.^[13]

12. Based on the observed violations of the parking restrictions, LIEP recommended that adverse action be taken against Heartland's license. On April 6, 2005, the City issued a Notice of Violation citing the seven instances where the observed number of vehicles on the business premises exceeded 37 between May 25, 2004, and March 8, 2005. Due to the adverse action being a second violation for Heartland, the proposed sanction was a fine of \$1,500 and a 10-day closure of the business.^[14]

13. Heartland filed a timely letter indicating that the facts alleged in the Notice of Violation were contested and a hearing was requested.^[15]

14. On April 18, 2005, the City issued the Notice of Hearing setting this matter on for hearing before the Administrative Law Judge. The Notice was served on the Licensee by mail, and filed with the Office of Administrative Hearings.^[16]

15. Heartland initiated a process for counting cars in July 2004.^[17] Employees would count the cars on the lot and record the total number of cars on the premises. Counts were conducted at approximately 10:00 a.m. and 3:00 p.m. If the count came to more than the allowable number of cars, the employee would direct customers to park off of the premises.^[18] The number of cars was only recorded **after** customers' cars left the premises. Counts of cars were separately maintained for cars on the premises and parked on the adjacent street.^[19]

16. Many of Heartland's customers make bi-weekly payments on their car loans, in person, directly to the business.^[20] A significant contributing factor to Heartland's parking problem is the nature of this business practice, which increases traffic on Heartland's premises by having customers returning to Heartland on a very frequent basis to make their car payments. Heartland can address this problem by either changing the bill payment process or increasing the number of parking spaces reserved for customers.

17. Heartland believes that some of the complaints lodged with LIEP are motivated by discrimination based on the race or national origin of the owner and employees. One employee recounted receiving an anonymous telephone call threatening a complaint, with a marked City vehicle passing by the lot ten minutes later.^[21] LIEP inspectors do not use automobiles bearing City markings. A vendor told the owner that some neighbors have been claiming that Heartland had been buying cars from a "chop shop."^[22] No evidence has been introduced at the hearing in this matter tending to show that LIEP was responding to anything other than complaints, based in fact, that Heartland had too many cars on its lot, or that a nearby lot was similarly overcrowded.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Saint Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to the St. Paul Legislative Code § 310.05 and Minn. Stat. § 14.55 (2004).

2. The hearing was conducted in accordance with the requirements of Minnesota Statutes sections 14.57 to 14.62 and applicable portions of the procedures set forth in section 310.05 of the Saint Paul Legislative Code.

3. The City has given proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.

4. The City bears the burden in this matter of proving by a preponderance of the evidence that adverse action is warranted with respect to the Licensee's auto repair garage license.

5. Chapter 310 of the Saint Paul Legislative Code contains general provisions relating to licenses issued by the City. Section 310.06(b)(5) of the Saint Paul Legislative Code provides that adverse action may be taken when "[t]he licensee or applicant has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license."

6. Adverse action is defined in Saint Paul Legislative Code § 310.01 to include suspension of licenses and the imposition of fines.

7. The City demonstrated by a preponderance of the evidence that the Licensee failed to comply with the condition that no more than 37 automobiles be present on the licensed premises. The City showed that the Licensee violated this provision on seven different dates between May 24, 2004 and March 8, 2005. The noncompliance ranged from one car over the limit to six automobiles over the limit. The Licensee has not refuted the City's showing.

8. The City's recommended closure of Heartland's business for ten days and imposition of a \$1,500 fine is not arbitrary or capricious and is a reasonable exercise of its discretion under section 310.06 of the St. Paul Legislative Code.

9. The Licensee has not shown that the City was engaged in discriminatory enforcement regarding the inspection of other businesses or issuance of citations for violating the conditions imposed on operations.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED:

That the Saint Paul City Council take adverse action against the second hand dealer-motor vehicles license and auto repair garage license of Heartland Auto Sales, Inc., d/b/a Heartland Auto Sales.

Dated this 4th day of August, 2005.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

LIEP has proposed sanctioning Heartland's license under the Saint Paul Legislative Code. Section 310.06(b)(5) of that Code authorizes adverse action against a license when:

The licensee or applicant has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license.

The condition cited by LIEP is the requirement that Heartland have no more than 37 automobiles on the premises at 1236 Arcade Street. LIEP has received complaint calls regarding the number of cars on Heartland's premises. Pursuant to its policy, LIEP initiates investigations only after complaints have been made by members of the public.

The investigation performed by LIEP showed a significant number of violations.^[23] The only evidence of compliance by Heartland is the description of its car-counting process. That process is not geared to prevent violations, but rather recognizing when Heartland is already exceeding the limit and then addressing the problem. Heartland's car counting procedure is not evidence of compliance with the parking restriction.

Heartland alleged that LIEP was engaged in discriminatory enforcement. To support this assertion, Heartland introduced evidence regarding conditions at other used car businesses on Saint Paul's East Side. There is no evidence in the record regarding any applicable license restrictions on any of these businesses. Without knowing the license restrictions, there is no way of knowing whether LIEP is failing to enforce anything.

To sustain the affirmative defense of discriminatory enforcement, a licensee must show that:

- (1) That, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution; and
- 2) That the Government's discriminatory selection of him for prosecution had been invidious or in bad faith. . . .^[24]

At the hearing, the LIEP inspector testified that other used car businesses have been cited for permit violations. As discussed above, there is a general failure to show that similarly situated businesses have been treated differently.

LIEP has shown that its method of selection of businesses for enforcement is driven by complaints. That method has been held to constitute a valid basis for initiating investigations.^[25] The LIEP inspector was out on a complaint call (for a nearby business) when she first observed Heartland's lot. Inspectors are not required to ignore apparent violations. The inspector counted the cars on that occasion and observed a violation. The facts of this matter do not support a claim of discriminatory enforcement.

Heartland asserts that the City acknowledged the "successful completion of probation" that was confirmed in a letter from Heartland's counsel to the City Attorney's office.^[26] From this, Heartland infers that there could have been no violations of the parking restrictions prior to February 4, 2005. The City is not pursuing a probation violation (with the imposition of the stayed penalty from 2004). The City has alleged new violations and pursued those alleged violations as the basis for adverse action. The City is not required to pursue violations from the probation period as probation violations, rather than independent violations.

Based on the record in this matter, the Administrative Law Judge finds that the City has shown by a preponderance of the evidence that adverse action should be taken against the Licensee's license for noncompliance with the parking limitation placed on the license. Such adverse action may include a fine of up to \$1,500 and closure of Heartland's business for up to 10 days. The City Council may wish to take into account the manner in which all other aspects of Heartland's business is run, generally showing it to be a "good neighbor" to the community and presenting a positive image on Arcade Street. A downward adjustment in the amount of the fine or length of the business closure would not be arbitrary or capricious and is within the reasonable exercise of City Council's discretion under the Saint Paul Legislative Code.

S.M.M.

^[1] Ex. 1-5.

^[2] Testimony of Schweinler; Ex. 1-2.

^[3] Testimony of Schweinler.

^[4] Testimony of Schweinler

^[5] Testimony of Ghaffari.

^[6] Ex. 1-6.

^[7] Ex. 10.

^[8] Ex. 4-1; Testimony of Ghaffari.

^[9] Testimony of Schweinler.

^[10] Testimony of Schweinler.

^[11] Exhibit 2-1. The Notice of Violation indicated the number of cars was 42 on that date. Ex. 3-1. Whichever number is correct, the total is far higher than the allowable 37 vehicles.

^[12] Testimony of Schweinler.

^[13] Ex. 2-1.

^[14] Ex. 3-1.

[15] Ex. 5-1.

[16] Ex. 6-1.

[17] Testimony of Ghaffari.

[18] Testimony of Hernandez.

[19] Testimony of Hernandez; Testimony of Morales. The testimony did not make clear whether the cars on the street were connected to Heartland in any fashion (employees, customers, or cars for sale).

[20] Testimony of Ghaffari.

[21] Testimony of Morales.

[22] Testimony of Ghaffari. A “chop shop” is a receiver of stolen cars, that are then disassembled and the parts resold.

[23] Heartland disputed the quality of the City’s evidence, noting that the LIEP inspector’s testimony was largely unsupported by documentation and the inspector did not identify herself at the time(s) of inspection to any employees of Heartland. The LIEP inspector’s testimony was credible and has been accepted by the ALJ in this matter. Perhaps a better practice would be to document the visits, using some type of standard form, and enter the documentation into the record of these proceedings. See, e.g. **ITMO A.A. Avenue Grocery**, OAH Docket No. 10-0900-12876-2 (Recommendation issued June 23, 2000)(describing the Minnesota Department of Health investigation procedures in Findings 7 through 9).

[24] **ITMO the Alteration of the Cross Section of Big Sandy Lake (1-62) by Robert Graff, Without a Permit from the Commissioner of Natural Resources**, OAH Docket No. 3-2000-9637-2 (Order issued September 1995)(citing **State v. Russell**, 343 N.W.2d 36, 37 (Minn. 1984) (quoting **United States v. Berrious**, 501 F.2d 1207, 1211 (2d Cir. 1974)).

[25] **ITMO the City of Inver Grove Heights vs. Burnell Beermann, d/b/a Beermann Services**, OAH Docket No. 2-2101-40-2 (Recommendation issued June 24, 1986).

[26] Ex. 8.